

EXECUTION AND ATTACHMENT UNDER THE  
FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

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*Introduction*

The Foreign Sovereign Immunities Act of 1976 (hereinafter designated as "the Act") accomplished four major objectives.<sup>1</sup> First, it codified the "restrictive" theory of sovereign immunity originally adopted by the State Department in the famous Tate Letter of 1952,<sup>2</sup> by declaring that "[u]nder international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned."<sup>3</sup> Second, the Act provided that claims of foreign states to immunity would in the future be decided solely by the courts.<sup>4</sup> This change was intended to ensure uniform application of the principles embodied in the Act,<sup>5</sup> and was a reform long advocated by commentators.<sup>6</sup> A third objective of the Act

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1. Pub. L. No. 94-583, §4(a), 90 Stat. 2892-2897 (codified at 28 U.S.C. §§1602-1611 (1976)).

2. Letter from Acting Legal Adviser to the Department of State Jack B. Tate to Acting Attorney General Phillip B. Perlman, reprinted in 26 DEP'T STATE BULL. 984 (1952).

3. 28 U.S.C. §1602 (1976).

4. *Id.*

5. H.R. REP. NO. 1487, 94th Cong., 2nd Sess. 7, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604 [hereinafter cited as H.R. REP. NO. 94-1487].

6. See Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT'L L. 168 (1946); Dickinson, *The Law of Nations as National Law: "Political Questions"*, 104 U. PA. L. REV. 451, 477-479 (1956); and Note, *International Law--Sovereign Immunity--The Last Straw in Judicial Abdication*, 46 TUL. L. REV. 841 (1972).

was to set up a procedure for service of process enabling plaintiffs to gain in personam jurisdiction over foreign states, thus making unnecessary the objectionable practice of attaching the property of a foreign state in order to gain jurisdiction.<sup>7</sup>

Finally, the Act improved the position of plaintiffs by making the property of foreign states liable to execution under certain conditions.<sup>8</sup> Although much has been written on the changes wrought by the Act, few commentators have done more than mention the execution provisions and none have examined them in detail.<sup>9</sup> The purpose of this article will be to examine the changes made by the Act in the area of sovereign immunity from execution and attachment, with particular emphasis on the implications for plaintiffs engaged in international business transactions.

#### A. *Prior Practice*

Prior to the passage of the Act both the State Department and the courts had recognized a distinction between sovereign immunity from jurisdiction and sovereign immunity from execution and attachment.<sup>10</sup> Under the restrictive theory of immunity purportedly followed by the United States after 1952, states were not immune from the jurisdiction of American courts in

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7. This is accomplished by 28 U.S.C. §1608 (1976). See H.R. REP. NO. 94-1487, *supra* note 5, at 23-26. For comments on this development, see von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANS. L. 33, 46-48 (1977) [hereinafter cited as von Mehren],

8. See 28 U.S.C. §§1609-1611 (1976).

9. Among the commentators who have treated the execution provisions are von Mehren, *supra* note 7, at 61-65; and Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning, and Effect*, 3 YALE STUD. WORLD PUB. ORD. 1, 20-24 (1976) [hereinafter cited as Weber].

10. *New York & Cuba M.S.S. v. Republic of Korea*, 132 F. Supp. 684 (S.D.N.Y. 1955). For an expression of the State Department's view, see 45 DEP'T STATE BULL. 275, 278 (1961). The distinction is also discussed in *Weilamann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959); and *Stephen v. Zivnostenska Banka, N.C.*, 15 A.D.2d 111, 222 N.Y.S.2d 128, *aff'd*, 12 N.Y. 2d 781, 235 N.Y.S.2d 1 (1962).

cases arising from their commercial activities,<sup>11</sup> However, their exemption from execution and attachment was broader, extending even to commercial activities. American practice recognized an absolute immunity from either type of seizure even in those cases where courts, for one reason or another, found no jurisdictional immunity to exist.<sup>12</sup> Commentators frequently criticized the failure to allow attachment or execution as rendering the exercise of jurisdiction a merely nominal gesture, since plaintiffs could rarely get satisfaction of a judgment without one or the other type of property seizure.<sup>13</sup>

The State Department, whose "suggestions" in sovereign immunity cases were usually considered

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11. The most important such case prior to the Act was *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), which contains a thorough discussion of courts' applications of the restrictive theory of sovereign immunity.

12. See, e.g., *Weilamann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959); *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1931); and *Bradford v. Chase National Bank*, 24 F.Supp. 28 (S.D.N.Y. 1938), *aff'd. sub nom.*, *Berger v. Chase National Bank*, 105 F.2d 1001 (2d Cir. 1939), *aff'd sub nom.*, *Schram v. Chase National Bank*, 309 U.S. 632 (1940). But at least one American court has permitted execution against the property of a foreign state. *Harris & Co. Advertising, Inc. v. Republic of Cuba*, 127 So.2d 687 (Fla. Dist. Ct. App. 1961).

13. See Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BR. Y.B. INT'L L. 220, 241-244 (1951); Garcia-Mora, *The Doctrine of Sovereign Immunity of Foreign States and Its Recent Modifications*, 42 VA. L. REV. 335, 359 (1956); Comment, *International Law--Sovereign Immunity--Seizure of Property under the Restrictive Immunity Doctrine*, 54 MICH. L. REV. 1008, 1010 (1956); Timberg, *Sovereign Immunity, State Trading, Socialism and Self-Deception*, 56 NW. U. L. REV. 109, 119-122 (1961); Brandon, *The Case Against the Restrictive Theory of Sovereign Immunity*, 21 INS. COUNS. J. 11, 14 (1954); Note, *Sovereign Immunity vs. Execution of Judgment: A Need to Reappraise Our National Policy*, 13 BOST. COL. IND. & COM. L. REV. 369, 378-382 (1971); Note, *Sovereign Immunity-Waiver and Execution: Arguments From Continental Jurisprudence*, 74 YALE L.J. 887, 912 (1965).

binding by the courts,<sup>14</sup> also adhered to the theory of absolute immunity from seizure,<sup>15</sup> at times urging it on courts which were less than enthusiastic in their reception of the principle.<sup>16</sup> In 1959, the State Department partially changed its position, adopting a policy under which pre-judgment attachment of state property was permitted, but only for purposes of gaining jurisdiction in quasi in rem actions.<sup>17</sup> However, absolute immunity from execution remained the rule, even when there was no immunity from attachment for jurisdictional purposes.<sup>18</sup>

As noted above, the Act prohibits the use of attachment as a means of gaining jurisdiction and severely restricts its use for other purposes.<sup>19</sup> In addition, the Act reverses both the State Department position and the prevailing case law by making the property of a foreign state liable to execution under certain circumstances.<sup>20</sup> However, it does continue the previous distinction between immunity from seizure and immunity from jurisdiction by providing states with broader immunity from execution and attachment than from jurisdiction. One of the most important questions raised by the Act is the exact extent to which the property of a foreign state is now subject to execution and attachment.

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14. See generally Lyons, *The Conclusiveness of the "Suggestion" and Certificate of the American State Department*, 24 BR. Y.B. INT'L L. 116 (1947); and *Chemical Natural Resources, Inc. v. Republic of Venezuela*, 420 Pa. 134, 215 A.2d 864 (S.Ct. Pa. 1966).

15. See, e.g., *Weilamann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959); and *Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1931).

16. See *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971), *cert. denied*, 404 U.S. 985.

17. See the letters reprinted in 57 AM. J. INT'L L. 408 (1963) and M. Whiteman, 6 DIG. INT'L L. 709, 711-12 (1968).

18. *Three Stars Trading Co. v. Republic of Cuba*, 32 Misc. 2d 4, 222 N.Y.S.2d 675 (Sup. Ct. 1961).

19. See pp. 138-139 *infra*.

20. 28 U.S.C. §§1609-1611 (1976).

B. §1609; *Retention of Absolute Immunity as the Rule*

Section 1609 of the Act provides that, subject to international agreements to which the United States is a party,<sup>21</sup> property of a foreign state in the United States "shall be immune from attachment, arrest, and execution except as provided in sections 1610 and 1611 of this chapter." The drafters of the Act were careful to retain immunity from execution as the rule, rather than enumerating categories of property which were subject to immunity and denying immunity to those types of property not covered.<sup>22</sup> Thus, when execution is sought against state property, the ultimate burden lies on the foreign state to prove its entitlement to immunity.<sup>23</sup>

C. §1611: *Property Granted Absolute Immunity From Execution*

Section 1611(b) provides absolute immunity from execution for certain property of a foreign state and its agencies, instrumentalities, and subdivisions. But it creates difficulties by departing from the Act's chosen principle that sovereign immunity is premised upon the nature of the underlying act or transaction, rather than its purpose. This section of the Act reverts to the purpose test by looking to the use of the property as controlling its entitlement to immunity. The problems raised by this departure from the standards applied elsewhere in the Act are compounded by the failure to provide adequate guidelines to ensure consistent application of the Act.

The courts, to whom is left the task of determining the purpose or use of the property, will have to formulate their own criteria, since neither the Act nor its legislative history makes clear the method by which

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21. The Act is also subject to future treaties or international agreements, since they are of equal rank with legislation. Congress worded 28 U.S.C. §1609 (1976) in this manner so as not to leave the impression that it was approving future international agreements on this subject. H.R. REP. NO. 94-1487, *supra* note 5, at 10.

22. *Immunities of Foreign States: Hearings on S. 3493 Before the Subcomm. on Claims and Government Relations of the House Comm. on the Judiciary*, 93rd Cong., 1st Sess. 31-32 (1973) [hereinafter cited as *Hearings on S. 3493*].

23. H.R. REP. NO. 94-1487, *supra* note 5, at 17.

the determination of purpose is to be made. The Act is an improvement on the Tate Letter, which was often criticized for failing to provide guidelines which would enable courts to apply consistently its restrictive doctrine of sovereign immunity,<sup>24</sup> but it is not, and could not be, explicit on all points. Some vagueness is to be expected in all legislation of this type. Judicial decision-makers will have to rely on the overall intent of the Act and their previous experience in this area to provide themselves with a workable method of interpreting the provisions of the Act.

The question at the threshold in any instance where the absolute immunity granted in §1611(b) is raised as a defense is, of course, whether the property is used for a purpose which renders it immune from execution. When such a defense is pleaded, a question will arise: Are the assertions of officials of the foreign state as to the use of the property conclusive, or may inquiries be undertaken to determine the facts of the case? This problem can be broken down into two parts: are the officials' statements dispositive, and, if not, by whose standards are the facts to be judged? The answers to these questions are not particularly difficult. Under the Act, it is clear that courts must look beyond the statements of those representing the foreign state, to the facts of the case.<sup>25</sup> Furthermore, the evidentiary standards to be applied are those of the American forum.<sup>26</sup>

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24. See, e.g., Lowenfeld, *Claims Against Foreign States--A Proposal For Reform of United States Law*, 44 N.Y.U. L. REV, 901, 906-908 (1969).

25. The House Report assumes that statements and other evidence produced by the defendant state will be only prima facie evidence of immunity, and will be subject to rebuttal by the plaintiff. H.R. REP. NO. 94-1487, *supra* note 5, at 17.

26. *Id.* at 12. "This bill ... sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities." Cf. Bishop, *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L LAW 93, 102-106 (1953) (absent international standards, only those of the forum can and should be logically applied).

Implementation of the restrictive theory of immunity from execution requires judicial assertiveness. It is up to each court to determine, as far as possible, the use to which the property is or will be put by inquiring into the facts of the case before it and weighing *all* available evidence. The statements of agents of the foreign state, while entitled to great weight, are merely one type of evidence which may be available; they have not generally been held conclusive as to use or any other issue whether or not there has been contradictory evidence.<sup>27</sup> The argument that such an inquiry, made in the face of a direct assertion by the foreign state, would be an affront to the state's dignity and harm American foreign relations is irrelevant in a legal proceeding arising under the Act. Congress left no doubt that the immunity decision was to be guided by legal principles, not practical foreign policy considerations.<sup>28</sup> For a court to accept as conclusive the undocumented assertions of obviously

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27. In *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938), the Spanish ambassador intervened in an action, claiming sovereign immunity for a libeled ship. The Supreme Court held that:

...[The District Court] was not bound, as the Court of Appeals thought, to accept the allegations of the suggestion as conclusive. The Department of State having declined to act, the want of admiralty jurisdiction because of the alleged public status of the vessel and the right of the Spanish Government to demand possession of the vessel as owner if it so elected, were appropriate subjects for judicial inquiry upon proof of the matters alleged.

But the filed suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations. This Court has explicitly declined to give such a suggestion the force of proof or the status of a like suggestion coming from the executive department of our government....

The district court rightly declined to treat the suggestion as conclusive or sufficient as proof to require the court to relinquish its jurisdiction....

*Id.* at 75-76,

See also *National American Corp. v. Federal Republic of Nigeria*, 420 F.Supp. 954, 956-957 (S.D.N.Y. 1976); *Pan American Tankers Corp. v. Republic of Vietnam*, 291 F.Supp. 49, 52-53 (S.D.N.Y. 1968); and *Ervin v. Quintinilla*, 99 F.2d 935, 939 (5th Cir. 1938), *cert. denied*, 306 U.S. 635 (1939).

28. H.R. REP. NO. 94-1487, *supra* note 5, at 7.

interested representatives of foreign states would be to create a barrier to execution analogous to the barrier to jurisdiction long presented by a State Department suggestion of immunity.<sup>29</sup> It would allow in by the back door the very policy considerations which Congress hoped that the Act would remove from the decisionmaking process.<sup>30</sup>

Moreover, when considering the representatives' statements and other available evidence, the standards to be applied by the courts are those of the forum, not the foreign state.<sup>31</sup> Whether the evidence is sufficient to show that property has a certain use, and whether the use shown is one which entitles the property to immunity, are questions of American law. Since sovereign immunity is an affirmative defense under the Act, the defendant state must provide prima facie evidence that the use of the property entitles it to immunity; only then is the burden of proof shifted to the plaintiff to show a non-immune use.<sup>32</sup> While the standards may currently appear somewhat vague, they will undoubtedly be further defined as more cases involving the execution provisions of the Act make their way into the legal process.

Section 1611(b)(1)--in which the funds of a foreign central bank or monetary authority, on deposit with an American bank and "held for its own account," are granted immunity in all cases except those in which the central bank or its parent government has explicitly waived immunity from execution--raises few problems. The purpose of this provision is twofold: to encourage deposits of foreign funds in the United States by ensuring that such funds will not be disturbed by American courts, and to prevent the harm to American foreign relations which might occur if foreign states' monetary reserves were subject to execution.<sup>33</sup> The Act itself does not make clear when a foreign central bank's funds are "held for its own account." The House Report explains that this subsection applies to funds which are

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29. See Lyons, *supra* note 14, at 144-146.

30. H.R. REP. NO. 94-1487, *supra* note 5, at 7.

31. See note 26 *supra*.

32. H.R. REP. NO. 94-1487, *supra* note 5, at 17.

33. *Id.* at 31.



"used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states."<sup>34</sup>

Making such distinctions is likely to prove difficult in practice, particularly where funds in an account have been, and continue to be, used for both central banking and non-central banking functions. Although courts might give broad effect to this subsection by refusing to allow execution against funds in accounts which serve in such a dual capacity, this result would be inconsistent with the purpose of the Act. Its effect would be to preclude execution against the funds of foreign central banks in almost all cases, since it would quickly become apparent to central banks that it would be to their advantage to begin mixing the uses of the funds in each account if they did not do so already. A more equitable result, and one more consistent with the Act, could be achieved by examining the account records and extracting an approximation of the relative amounts used in central banking and non-central banking functions.<sup>35</sup> The court might then allow execution against a percentage of the account corresponding to that used for non-central banking.

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34. *Id.*

35. The court in *Harris & Co. Advertising, Inc. v. Republic of Cuba*, 127 So.2d 687 (Fla. Dist. Ct. App. 1961), seems to have had such a solution in mind when it put the burden on the state to show that the bank accounts sought to be executed against were immune:

In the present case, deposits in various banks have been attached, which, until it is shown by preponderance of the evidence that they are directly related to activities *jure imperii*, cannot be deemed immune from the powers of the courts within the territories of which they are kept by the decision of the foreign government itself. It would not be compatible with the principle of judicial powers of a sovereign nation if funds deposited as private funds in a private bank in this country, particularly if derived, used; or intended to be used in business type of activities here, would be clothed in a veil radiating foreign sovereignty,

*Id.* at 693.

functions.<sup>36</sup> Such a procedure would be greatly simplified by the availability of the account records, which probably would have been brought in by the central bank to support its claim of immunity.

The lack of guidelines for implementing the purpose test makes §1611(b)(2) more difficult to apply than §1611(b)(1). Much confusion will be engendered by the former, which grants absolute immunity to state property which "is, or is intended to be, used in connection with a military activity and (A) is of a military character or (B) is under the control of a military authority or defense agency." The reasons for the inclusion of §1611(b)(2) are explained in the legislative history.<sup>37</sup> Implementation of United States foreign policy often requires purchases of military equipment and supplies in the United States by foreign governments, and allowing execution against such property would jeopardize that policy. In addition, Congress feared that a foreign state might permit execution against American military property within its territory under a reciprocal application of the Act.

But the burden remains on the foreign state to show that the property in question is "used in connection with a military activity." The courts will have to interpret this term. The legislative history of the Act sheds some light upon its intended scope. The drafters of the Act designed this subsection to provide immunity for "food, clothing, fuel and office equipment which, although not of a military character, is essential to military operations."<sup>38</sup> It was obviously the intention of the drafters to draw a distinction between military and "civilian" uses, as those terms are generally understood. However, these categories shade into one another at times, as Congress seems to have recognized in immunizing property "used in connection with a military activity." The term "used in connection with" is broader than "used for": the former

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36. This solution would not be entirely satisfactory, since a state could switch funds from one account to another, thus evading the jurisdiction of a court by reducing the assets liable to execution in the jurisdiction to virtually nothing. While pre-judgment attachment would aid plaintiffs, its availability is limited. See pp. 138-139 in text.

37. H.R. REP. NO. 94-1487, *supra* note 5, at 31.

38. *Id.*

also covers property whose use is only peripherally military. Should the courts look beyond the Act for guidance, they will find that the "civil-military" distinction has been drawn elsewhere in the law. The Supreme Court, in construing analogous statutory provisions, has limited their scope to uses which would commonly be considered "military," while at the same time recognizing that the exigencies of war may expand their scope somewhat by providing a different balancing of the relevant factors.<sup>39</sup> Such an interpretation

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39. For instance, §321 of the Transportation Act of 1940, 49 U.S.C. §65, provides that railroads were to be paid at land grant rates (*i.e.*, fifty percent of the prevailing commercial tariff rates) for transporting "military or naval property of the United States moving for military or naval and not for civil use." A number of cases ensued as the railroads and the government sought to clarify the types of property covered. The leading cases, *Powell v. United States*, 330 U.S. 238 (1947), and *Northern Pacific Ry. Co. v. United States*, 330 U.S. 248 (1947), were decided the same day, and were intended to be read together. In *Powell*, farm fertilizer was purchased by the United States and shipped over the respondents' lines. The shipments were consigned to the British Ministry of War Transport for use in Britain's war-time program for intensified production of food. In finding that the property did not come under the provisions of §321, the Court emphasized the difference between military and civilian use:

In the second place, the language of §321(a) emphasizes a distinction which would be largely obliterated if the requirements of national defense, accentuated by a total war being waged in other parts of the world, were read into it. Section 321(a) uses "military or naval" use in contrast to "civil" use. Yet if these fertilizer shipments are not for "civil" use, we would find it difficult to hold that like shipments by the Government to farmers for this country during the course of the war were for "civil" use. For in total war food supplies of allies are pooled; and the importance of maintaining full agricultural production in this country if the war effort was to be successful cannot be gainsaid. When the resources of a nation are mobilized for war, most of what it does is for a military end--whether it be rationing, or increased industrial or agricultural production, price control, or the host of other familiar activities. But in common parlance, such activities are civil, not military. It seems to us that Congress marked that distinction when it wrote §321(a). If that is not the distinction, then "for military or naval and not for civil use" would have to be read "for military or naval use or for civil use which serves the national defense." So to

would fit quite well in the context of the Act,

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39. (Continued)

construe §321(a) would it seems to us, largely or substantially wipe out the line which Congress drew and, in time of war, would blend "civil" and "military" when Congress undertook to separate them. Yet §321(a) was designed as permanent legislation, not as a temporary measure to meet the exigencies of war. It was to supply the standard by which rates for government shipments were to be determined at all times--in peace as well as in war. Only if the distinction between "military" and "civil" which common parlance marks is preserved, will the statute have a constant meaning whether shipments are made in days of peace, at times when there is hurried activity for defense, or during state of war.

330 U.S. at 245-46,

At the same time, the Court recognized in *Northern Pacific Ry. Co.* that items might be for military use, although not necessarily intended for the direct use of the armed forces:

It is also suggested that the property covered by the exception in §321(a) is confined to property for ultimate use directly by the armed forces. Under that view materials shipped for the construction of vessels for the Maritime Commission and used to service troops at home or abroad would not be "military or naval" property. We likewise reject that argument. Civilian agencies may service the armed forces or act as adjuncts to them. The Maritime Commission is a good example. An army and navy on foreign shores or in foreign waters cannot live and fight without a supply fleet in their support. The agency, whether civil or military, which performs that function is serving the armed forces. The property which it employs in that service is military or naval property, serving a military or naval function.

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But in general the use to which the property is to be put is the controlling test of its military or naval character. Pencils as well as rifles may be military property. Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in

If it is determined that the property is "used in connection with a military activity," then it is immune from execution if either of the conditions in §1611(b)(A) or (B) is fulfilled. Paragraph (A) has a much narrower scope than (B). Section 1611(b)(2)(A) grants immunity only if both the character *and* the function of the property are military.<sup>40</sup> This creates a dual test which will prove redundant in the great majority of cases. Property which is military in character, such as tanks and missiles, will almost always be used in connection with a military activity, and would therefore be immune under either test. The dual requirement, however, becomes important and may raise issues in cases involving property which is military in character, but the end use of which is in dispute. A good example is a shipment of pistols, which might be used by the armed forces, the police, or some special organization which is para-military in nature.

The immunity granted in §1611(b)(2)(B) is, however, much broader. Under this provision, property used in connection with a military activity need only be "under the control of a military authority or defense agency" in order to be immune from execution. Thus, the nature or character of the property is irrelevant; the key factors in determining when immunity exists are the use of the property and the nature of the agency having control over it.

Courts attempting to interpret this section will find the congressional guidelines even more vague than elsewhere in this legislation. For instance, the definition given to "control" is intended to include authority over disposition and use, without necessarily requiring physical control or title to the property.<sup>41</sup>

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39. (Continued p.2.)

training or preparation for war, in combat, in maintaining them at home or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under §321(a). The property in question may have to be reconditioned, repaired, processed or treated in some other way before it serves their needs. But that does not detract from its status as military or naval property.

330 U.S. 248, 253-55,

40. H.R. REP. NO. 94-1487, *supra* note 5, at 31,

41. *Id.*

No explanation of the important term "military authority" is given, a circumstance which will probably lead to broad judicial interpretations.<sup>42</sup>

Under the scant guidance given in this section, it would seem likely that various problems will arise. For instance, it would be to the advantage of states which are ruled by juntas or military governments to claim that all of their property is used in connection with a military activity. Certainly, such a government is a "military authority" under a literal reading of the Act. What then should be done if it claims immunity for a Cadillac which it has bought for the official use of the colonel who heads the state oil company? Given the context, no court could find that such a use was "in connection with a military activity," since the sale of oil is obviously a commercial activity. But the example illustrates that, given the breadth of the term "military authority," it seems likely that the immunity granted in §1611(b)(2)(B) will be circumscribed only by interpretation of the requirement that the property be "used in connection with a military activity."

The inclusion of the wording "used, or *intended to be used* in connection with a military activity" may itself contain a loophole, since this phrase may well be interpreted to include all property under the control of a military authority. Astute counsel for foreign states will quickly learn that, under this wording, the state need only assert an intent to use the property in connection with a military activity; the use can always be changed once the property is out of the United States. Even property currently operated in the United States in connection with a commercial activity (*e.g.*, a commercial airliner), might slip through this loophole if a court were to accept a state's claim of an intent to use it in connection with a future military activity, since property is immune if its present or intended *future* use is military.<sup>43</sup> In dealing with

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42. It is doubtful whether the immunity would depend, for instance, upon whether the military authority were recognized by the United States as the *de jure* government of the state. Cf. *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 138 N.E. 24 (Ct. App. 1923) (de facto government of Russia held entitled to sovereign immunity despite fact of U.S. non-recognition).

43. See H.R. REP. NO. 94-1487, *supra* note 5, at 31.

such assertions by foreign states, courts should keep in mind that the statements are only evidence to be weighed.<sup>44</sup> Other evidence, particularly prior practice of the state and any statements made in the course of business dealings concerning the future use of the property, may also be highly relevant.

D. *§1610(a): Exceptions to the Rule of Immunity from Execution*

The inquiry into the immunity from execution of the property of a foreign state does not end with §1611. Even if property is not absolutely immune under §1611 by virtue of its use, courts must still look to §1610 to ascertain whether it falls into one of the categories of property specifically excepted from immunity. If it does not come under one of these categories, then it is still immune.

In order to be excepted from immunity from execution under §1610(a), the property of a foreign state<sup>45</sup> must first of all be "used for a commercial activity in the United States." No explanation of this phrase is given, but its key is the term "commercial activity;"

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44. Cf. *National American Corporation v. Federal Republic of Nigeria*, 420 F.Supp. 954 (S.D.N.Y. 1976) (Affidavits of Nigerian officials to the effect that the signing of contract at issue was "an act concerning the armed forces" held not sufficient to require granting a motion for dismissal; resolution of the issue must await trial).

45. A major problem for courts will undoubtedly be determining the ownership of property under economic systems different from our own. Plaintiffs will tend to seek declarations of agency ownership in order to invoke the more liberal provisions of 28 U.S.C. §1610(b) (1976), while defendants will be more likely to try to prove state ownership. Among the cases where the ownership problem has been discussed are *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978); *Edlow International v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827 (D.D.C. 1977); *Prelude Corp. v. Owners of F/V Atlantik*, 1971 A.M.C. 2651 (N.D. Cal. 1971); and *The I Congresso del Partido*, [1977] 1 Lloyd's L. Rep. 536 (Adm. Ct.).

which is defined in §1603(d).<sup>46</sup> In both §1603 and §1610 the emphasis is on the difference between activities which are commercial in nature (i.e., those which are "customarily carried on for profit" in the American economic system), and those whose "essential nature is public or governmental."<sup>47</sup> The consideration of "purpose" in characterizing an activity is specifically rejected under the Act.<sup>48</sup> An activity which is by nature commercial, but which is entered into by a state for a public or governmental purpose, remains a "commercial activity."<sup>49</sup> Property which is used for a commercial activity is thus liable to execution even if

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46. "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. §1603(d) (1976).

47. H.R. REP. NO. 94-1487, *supra* note 5, at 16.

48. *Id.* "Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a governmental building constitutes a commercial activity.... Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public purpose." The Act's reliance on the nature of the activity leads to the results characterized as "astonishing" in *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 359 (2d Cir. 1964), by removing jurisdictional immunity from such acts as a foreign state's "leasing of property, its borrowing of money, [and] its employment or engagement of laborers, clerical staff or public relations or marketing agents." H.R. REP. NO. 94-1487, *supra* note 5, at 16.

It is important to note that the Act renders obsolete in this regard the categories of immune activities set out in *Victory Transport*, and continued reliance on that case is misplaced. For an example of a court relying on the *Victory Transport* categories to reach a decision which is wrong under the Act's standards, see *Gittler v. German Information Center*, 95 Misc.2d 788, 408 N.Y.S. 2d 600 (Sup. Ct. 1978).

49. "As the definition indicates, the fact that the goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical." H.R. REP. NO. 94-1487, *supra* note 5, at 16. See *United Euram Corp. v. U.S.S.R.*, 461 F. Supp. 609 (S.D.N.Y. 1978) in which the court held that contracts signed by an American impresario and a Soviet agency were commercial in character, despite having been entered into pursuant to a U.S.-U.S.S.R. cultural exchange agreement.



the activity is one carried on for a public purpose.<sup>50</sup>

The vagueness of the term "used for a commercial activity" seems bound to lead to unnecessary confusion and conflicting interpretations, as courts grapple with the question whether "used for" requires actual use of the property in the United States. It seems unlikely that Congress intended to restrict the category of property "used for a commercial activity" to cases of actual operation.<sup>51</sup> Such an interpretation would, for instance, render immune from execution a cargo of Pepsi Cola which might be in a Baltimore warehouse awaiting shipment to the Soviet Union, a result which is hardly consistent with the tenor of the Act, and which cannot be explained by reference to any of its principles. Mere ownership by a state of property which ordinarily is, and may later be, used for a commercial purpose, or of property which is commercial in nature, should satisfy this requirement. Thus, property which is held but not actually in operation in the United States should be liable to execution. This view is supported by evidence in the legislative history of an earlier version of the Act that property need not be in operation in order to be subject to execution.<sup>52</sup> Such a

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50. While the demise of *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), as a precedent in the area of jurisdictional immunity is clear (see note 48 *supra*), at least one commentator has suggested that its criteria may still have some validity in the area of immunity from execution. See von Mehren, *supra* note 7, at 61. However, this is not correct. *Victory Transport* was an important, if ultimately unsuccessful, attempt to provide guidelines for determination of immunity from jurisdiction by fashioning categories based on both the nature and the purpose of a state's acts. Transfer of its criteria or categories to cases arising under the Sovereign Immunities Act can only produce confusion and inconsistent results, since the Act uses different criteria to determine immunity from execution.

51. If this were so, then consistency would require that property "used in connection with a military activity," and therefore immune under 28 U.S.C. §1611(b)(2) (1976), also be operated or used in the United States. Such a result makes no sense and can not be what was intended. See H.R. REP. NO. 94-1487, *supra* note 5, at 31.

52. See *Hearings on S. 3493*, *supra* note 22, at 45: "The governing principle, broadly stated, is that property *held* for commercial purposes should be available for the satisfaction of judgments rendered in connection with commercial activities." (emphasis added). Although not controlling as to the present meaning, the passage is at least indicative of the intent of the drafters.

broad construction would be in harmony with the general purposes of the Act since it would restrict the immunity of foreign states engaged in commercial activity. Of course, if this construction is rejected and actual use of the property in the United States is held to be a prerequisite to execution, the scope of §1610(a) will be reduced and execution against state property will be less frequent.

But no matter which construction is adopted, an additional problem will present itself. Property which is "used for a commercial activity" may also have contemporaneous uses which would tend to render it immune from execution. Examples of such "mixed use" might include a shipment of cement, part of which is intended for use in constructing a military airbase and part of which is for civilian distribution; or a building whose use is divided between a consulate and the foreign state's official agency charged with purchasing American coal.<sup>53</sup> The issue is not unique to this section; the problem of "mixed use" arises in various provisions of the Act, and one can only hope for a uniform treatment of the problem. Consistent application of the principles embodied in the Act would require allowing execution in proportion to that portion of the property dedicated to commercial use, but obviously this will be impossible in many cases.<sup>54</sup>

Once the threshold question of whether the property is used for a commercial activity has been answered affirmatively, it is then liable to execution if it fulfills any one of the requirements of §1610(a) or (b). It is important to note that the approach used to withdraw immunity differs between subsections. Subsection 1610(a), which applies to the property of foreign states and their agencies, instrumentalities

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53. The problem of "mixed use" of bank accounts is discussed at pp. 115-116 *supra*.

54. For instance, an automobile which was used by members of both a Soviet Trade Mission and its embassy would be "used for a commercial activity," but it could hardly be divided even if that portion of its use which was "for a commercial activity" were ascertainable. It is hard to say in such situations whether the property should be liable to execution if the major part of its use is commercial, or whether such property should be immune as long as any of its use is for a non-commercial activity. The congressional intent and the Act itself are unclear.

and subdivisions, is phrased so as to remove immunity from certain property, rather than from the sovereign entity itself. This approach provides, in general, for narrower withdrawal of immunity than is contemplated in §1610(b), which applies only to agencies and instrumentalities,<sup>55</sup> and which removes the immunity of the sovereign entity and, ipso facto, that of all its property.

Section 1610(a)(1) makes property liable to execution if the state has waived its own immunity from execution or attachment in aid of execution.<sup>56</sup> However, even if a state explicitly waives its own immunity by contract or treaty, for instance, its property remains immune from execution unless it is used for a commercial activity. Apparently, the Act draws a distinction between the immunity of a foreign state and that of its property. This distinction is unique to the Act, and was probably the result of inadvertent drafting rather than any specific intent on the part of the drafters to create a new dichotomy in international law.<sup>57</sup>

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55. Agencies and instrumentalities are defined in 28 U.S.C. §1603(b) (1976);

An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Application of these criteria will necessarily involve difficult and complicated questions of foreign law. Courts have, however, dealt with such issues in the past. *See, e.g., Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849 (S.D.N.Y. 1978); *Edlow International v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827 (1977); and *Krajina v. The Tass Agency*, [1949] 2 All E.R. 274 (C.A.).

56. The immunity referred to in 28 U.S.C. §1610(a)(1) (1976) is that of the sovereign entity, not that of the property. *See* H.R. REP. NO. 94-1487, *supra* note 5, at 28.

57. Nothing in H.R. REP. NO. 94-1487, *supra* note 5, indicates that the authors realized that this dichotomy was being created.

At any rate, an effective waiver of immunity from execution can be made either explicitly or implicitly by the state. An explicit waiver would include a clause in a treaty or contract governing a transaction.<sup>58</sup> But it was also intended that the Act be interpreted such that "a foreign state may have waived its immunity from execution, *inter alia*, by ... an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution."<sup>59</sup> This reference in the House Report to waiver by "certain steps taken by the foreign state in the proceedings leading to judgment" is curious, and merits examination.

Prior to the Act, courts had held that any action by a foreign state in a proceeding, other than entering a special appearance to contest jurisdiction, might constitute a waiver of immunity from jurisdiction.<sup>60</sup> But the prior case law had generally maintained that a waiver of jurisdiction, whether explicit or implicit, was not also effective as a waiver of immunity from execution.<sup>61</sup> Since the House Report's reference to

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58. Certain clauses in a contract (*e.g.*, an agreement by the parties to submit disputes to binding arbitration), may also constitute implicit waivers of immunity. See *Victory Transport v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964); and *Ipitrade Int'l, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978).

59. H.R. REP. NO. 94-1487, *supra* note 5, at 28.

60. The entry of a general appearance has been held to act as a waiver of immunity. *Flota Maritima Browning de Cuba v. M/V Ciudad de la Habana*, 335 F.2d 619, 625 (4th Cir. 1964); *The Sao Vicente*, 281 F. 111, 114 (2d Cir. 1922), *cert. dismissed*, 260 U.S. 151, *petition for writ of prohibition and/or mandamus dismissed*, 264 U.S. 105 (1924); *Ervin v. Quintinilla*, 99 F.2d 935, 938 (5th Cir. 1938), *cert. denied*, 306 U.S. 635 (1939). The act of taking depositions and appearing in court to request adjournment of the service of process was held to be a waiver in *The Mangolia*, 1942 A.M.C. 35 (S.D.N.Y. 1941).

61. *Dexter and Carpenter, Inc., v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1931); and *New York and Cuba M.S.S. v. Republic of Korea*, 132 F. Supp. 684 (S.D.N.Y. 1955). But *cf.* *Flota Maritima Browning de Cuba v. M/V Ciudad de la Habana*, 335 F.2d 619 (4th Cir. 1964) (failure to assert sovereign immunity from jurisdiction after attachment of ship held to have waived immunity from execution "inferentially").

"certain steps ... in the proceedings leading to judgment" can only refer to those steps which are inconsistent with the entry of a special appearance or its equivalent, it raises the question whether Congress intended this part of the Act to overrule the case law by having certain implicit waivers of jurisdictional immunity also constitute waivers of immunity from execution. Such a construction of §1610(a)(1) would provide very broad liability to execution in cases where a state failed to raise the issue of immunity from jurisdiction at the outset, however, and seems inconsistent with the Act's other limitations on executions against state property.<sup>62</sup>

The wording and legislative history of §1610(a)(1) leave no doubt that the drafters intended to make it impossible for a foreign state to withdraw a waiver of immunity from execution or attachment unless the withdrawal is accomplished in compliance with a provision of the original waiver.<sup>63</sup> In the past, foreign states had on occasion reneged on waiver agreements; in such cases the courts, at times prodded by the State Department, generally held that sovereign immunity applied.<sup>64</sup> This approach has been abandoned in the Act in favor of "the better view ... that a foreign state which has induced a private person into a contract by promising not to invoke its immunity cannot, when a dispute arises, go back on its promise and seek to revoke the waiver unilaterally."<sup>65</sup> Of course, this provision also has the effect of rendering implicit waivers irrevocable.

62. Particularly noteworthy is Congress' failure to include judgments arising from claims under 28 U.S.C. §1605(a)(1) (1976), which covers implicit waivers of immunity from jurisdiction, as a ground for execution against the property of an agency under §1610(b)(2).

63. See H.R. REP. NO. 94-1487, *supra* note 5, at 18, for a discussion of the principles governing waiver.

64. See, e.g., *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir. 1971) (State Department recommendation of immunity given effect despite waiver clause in original contract); and *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24 (4th Cir. 1961) (same). The circumstances surrounding the latter case are described in *Jurisdiction of U.S. Courts in Suits against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 65-66 (1976) [hereinafter cited as *Hearings on H.R. 11315*]; and Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1607, 1610-11 (1962).

65. H.R. REP. NO. 94-1487, *supra* note 5, at 18.

Section 1610(a)(2) removes immunity from execution from all property which "is or was used for the commercial activity on which the claim is based." The ambiguous phrase "used for" appears again, but the difficulties it engenders will have already been disposed of by the court's initial determination that the property is used for a commercial activity. Certainly, it would be inconsistent to find that property was "used for" a commercial activity for other subsections of §1610, but not for this one.

Some commentators have pointed out a further ambiguity in §1610(a)(2): It is not clear whether the commercial activity must be the identical one which formed the basis for the claim, or whether it need only be generically the same.<sup>66</sup> And if the answer is the latter, what constitutes the genus? While this question will not arise in suits against agencies and instrumentalities of foreign states,<sup>67</sup> it may pose considerable difficulties in cases involving states or their political subdivisions. For instance, assume that an American corporation engaged in selling grain has obtained a judgment against a foreign state for damage caused to its facilities by the state's ship when it docked to load a cargo of wheat. If the state refuses to pay the judgment, must the grain company seek execution against the ship which originally caused the damage, or may it seek execution against other property of that state which is used in buying grain?

The solution to problems such as this depends upon whether courts interpret each discrete transaction as a separate "commercial activity," or as one in a series of transactions which together constitute a commercial activity. No definitive rule can be expounded. In

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66. This ambiguity was first pointed out to the congressional committee considering the original version of the Act by the *Report of the Committee on International Law of the Association of the Bar of the City of New York*. See *Hearings on H.R. 11315*, *supra* note 64, at 76. Curiously, the committee took no action to clarify the meaning of the section. See also von Mehren, *supra* note 7, at 63.

67. Since the claim would have to be based on a commercial activity in which the defendant agency or instrumentality was engaged, all property of the agency or instrumentality would be liable to execution under 28 U.S.C. §1610(h)(2) and §1605(a)(2) (1976), regardless of its use. See pp. 132-133 *infra*.

deciding what is a "commercial activity," Congress intended that judges be flexible; an act constituting a commercial activity in one set of circumstances might, in another context, be only a part of a wider commercial activity.<sup>68</sup> Judicial consideration of all of the circumstances surrounding the transaction in question is in order, although the Act should not be read as giving judges an entirely free rein.

For instance, in the hypothetical above, the "commercial activity" could arguably be (A) the single transaction in question, (B) the buying and shipping of wheat, (C) the buying and shipping of grains, or (D) the buying and shipping of foodstuffs. In deciding which characterization to apply, a court would need to determine, at the least, whether the transaction sued on was an emergency measure designed to alleviate a temporary shortage, or whether the foreign state regularly traded in wheat, or other grains or foodstuffs.

Section 1610(a)(2) was deliberately designed to stifle any attempt to circumvent the provisions of the Act by transferring property to another use or function subsequent to the incident upon which the claim is based, but prior to execution.<sup>69</sup> Moreover, the fact that it allows execution against property which "is or was used for the commercial activity" may have the additional effect of providing a remedy for plaintiffs whose judgments are based on claims arising out of transactions which are commercial in nature, but unique in the experience of the state. Once such a singular transaction is completed, there will be no property which "is" used for the commercial activity upon which the claim is based. Since none of the other §1610(a) exceptions would apply, the plaintiff would be without recourse if it were not for the retrospective application of this provision.

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68. Such an approach would be in harmony with both the definition of "commercial activity" in 28 U.S.C. §1603(e) (1976) as "either a regular course of commercial conduct or a particular commercial transaction or act," and the Congressional intent that the exact meaning of the term "commercial activity" be left to the courts. See H.R. REP. NO. 94-1487, *supra* note 5, at 16.

69. *Id.* at 28.

Section 1610(a)(3) denies immunity from execution if "the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law."<sup>70</sup> The issue of whether certain property was taken in violation of international law is left for judicial determination, although Congress did adopt a minimum standard requiring that the nationalization or expropriation of property be accompanied by payment of prompt, adequate, and effective compensation to the original owners.<sup>71</sup> The exact scope of this subsection remains open to debate.

The insertion of the term "rights in property" has been interpreted by at least one commentator as appearing to narrow §1610(a)(3)'s scope by excluding takings of contract rights.<sup>72</sup> Under this view, only takings of certain narrow types of property rights would give rise to a justiciable cause of action. However, this argu-

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70. Due to the development of the act of state doctrine, few American courts have dealt with cases involving or questioning the legality under international law of takings of property. Among the few reported cases are *Banco Nacional de Cuba v. Sabbatino*, 302 F.2d 845 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964); and *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. (1967).

71. H.R. REP. NO. 94-1487, *supra* note 5, at 19-20.

72. Von Mehren, *supra* note 7, at 59-61, expresses this view. He comes to this conclusion by extrapolating from courts' interpretations of the similar phrase "claim of title or other right to property" in the Hickenlooper Amendment, 22 U.S.C. §2370(e)(2). But, as von Mehren notes, the only case which considered the applicability of the Hickenlooper Amendment to concession agreements (as distinguished from other contractual rights) was *Occidental of Umm al Qay, Inc. v. Cities Service Oil Co.*, 396 F. Supp. 461 (W.D.La. 1975). That court held that the concession agreement at issue, which had never been acted upon by the concessionaire, was not a "claim of title or other right to property," but did acknowledge that "ore or oil from an expropriated mine or well" might come under the amendment. The precedential value of this case remains in doubt.

Sklaver, *Sovereign Immunity in the United States: An Analysis of S. 566*, 8 INT'L LAW 408, 416 (1976) argues that Congress did intend to include takings of contract rights, but reaches that conclusion on different grounds than does this article.



ment is not compelling.<sup>73</sup> There appears to be no reason, under international law, for Congress so to limit the jurisdiction of American courts,<sup>74</sup> nor is it clear that Congress intended to do so.<sup>75</sup> On the other hand, there is authority, both judicial and scholarly, for the proposition that deeds of concession, which are contracts, may create rights in property for the concessionaire.<sup>76</sup> The State Department has endorsed this view.<sup>77</sup> The House Report itself gives no indication that only property rights created in certain ways are to be included.<sup>78</sup> It seems more likely, then, that

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73. The assertion that Congress did not intend to alter the existing law on the act of state doctrine (*see* H.R. REP. NO. 94-1487, *supra* note 5, at 20) is not self-evident, in view of the fact that, at the least, 28 U.S.C. §1610(a)(3) and §1605(a)(3) (1976) extend the Hickenlooper Amendment (*i.e.*, they deny an act of state defense) where the expropriated property is not even in the United States. Presence of the expropriated property in the jurisdiction had been a prerequisite to judicial action prior to the Act.

In addition, the committee report makes it evident that the Act carves out the "commercial activities exception" to the act of state doctrine which four justices of the Supreme Court had argued for in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

74. *See* Weber, *supra* note 9, at 46.

75. The legislative report on this section is ambiguous. It merely refers back to the explanation of 28 U.S.C. §1605(a)(3) (1976). H.R. REP. NO. 94-1487, *supra* note 5, at 28. Neither section mentions rights in property which may be created by contract.

76. "[I]n Saudi Arabian Law, as in the Laws of the Western Countries, the oil concession is an institution which implies an authorization by the State, on the basis of a statute or of a contract, and necessarily entails the grant to the concessionaire of property rights in the oil." *Arbitration Between Saudi Arabia and the Arabian American Oil Co.*, *Arbitral Award*, 27 INT'L L. REP. 117, 171 (1957). *See also, e.g.*, *Anglo-Iranian Oil Co., Ltd. v. Jaffrate (The Rose Mary)*, 20 INT'L L. REP. 316 (1953) (S. Ct. Aden); and Campbell, *Principles of Mineral Ownership in the Civil Law and Common Law Systems*, 31 TUL. L. REV. 303, 311 (1957). *Cf.* *Arbitration Between Texaco Overseas Petroleum Co., California Asiatic Oil Co., and the Government of the Libyan Arab Republic* (unpublished award on the merits, 1977) (nationalization of concession held to constitute breach of contract, for which the concessionaires had a right to *restitutio in integrum*, or damages in lieu thereof).

77. *See generally* the *Statement by the Department of State on Policy on "Hot" Libyan Oil*, 13 Int. Leg. Mat. 767 (1974).

78. H.R. REP. NO. 94-1487, *supra* note 5, at 20.

§1610(a)(3), and the analogous §1605(a)(3), were intended to cover such takings. Thus, for the first time in American courts, plaintiffs may be able to litigate their rights to minerals in the ground in foreign countries, even if such a determination would be only ancillary to execution against property in the United States.

The applicability of the last part of §1610(a)(3) will be somewhat limited by the difficulty of determining property transfers in a foreign state, and proving such transfers to the satisfaction of an American court.<sup>79</sup> With fungible goods such as oil, there will be the additional problem of proving the source of a good which could have originated at wells belonging to any of a number of oil concessionaires.<sup>80</sup> However, should there be an increase in international barter, due perhaps to currency instability, more cases may arise under this section. For instance, oil which was expropriated in a foreign state might be traded to an American trader for a shipment of steel. In that situation, the original titleholder could seek execution against either the steel (which now belongs to the foreign government) or the oil in the possession of the trader. If a few such plaintiffs were successful in seeking to regain their property from third parties such as the trader, the expropriating state would soon find itself unable to sell or trade its oil in the United States. Potential customers would fear that they would not have good title, and simply refuse to deal.

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79. Cf. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 431-35 (1964). In *Sabbatino*, the Court considered such difficulties as weighing heavily against the creation of an exception to the act of state doctrine for takings of property in violation of international law.

80. *Id.* at 434. See also *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha*, 20 INT'L L. REP. 305 (Dist. Ct. Tokyo) (1953) (the court assumed *arguendo* that contested oil had been extracted from plaintiff's nationalized concession, but was unable to determine whether the extraction took place before or after nationalization). But proof of origin may not be unattainable. The plaintiff in *Occidental of Umm al Qay., Inc. v. Cities Service Oil Co.*, 396 F. Supp. 461, 464 (W.D. La. 1975), was apparently able to establish to the court's satisfaction the origin of the cargo of oil at issue.

Immunity is denied by §1610(a)(4) in cases where a foreign state has acquired immovable property through succession or gift, and a judgment has established the rights in that property of the person seeking execution. This provision at least partially reverses the previous common law rule that real property in the United States owned by a foreign state was immune from execution.<sup>81</sup> The practical effect of this subsection in terms of impact and number of cases will be slight. Questions of inheritance or undue influence are more likely to lead to cases under this section than are international business transactions, since sales or trades of property are not covered.

Under §1610(a)(5), contractual obligations to indemnify a state and proceeds owed to a state upon a policy of liability insurance are treated as property of the state and become liable to execution, provided that the obligation on the policy arises out of the claim which merged into the judgment. The effect of this provision is similar to a state "direct action" statute.<sup>82</sup> Its primary purpose is to protect those who suffer injury in automobile or other accidents involving employees of the foreign state.<sup>83</sup> But the wording is quite general, and there is no reason that this subsection would not also apply to states' large-scale commercial activities and their insurers.

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81. *See, e.g.,* City of New Rochelle v. Republic of Ghana, 44 Misc. 2d 773, 255 N.Y.S.2d 178 (1964), and State ex rel National Institute of Agrarian Reform v. Dekle, 137 So.2d 581 (1962) (Fla. Dist. Ct.), *cert. denied*, 146 So.2d 753.

82. Examples of such statutes are found at 22 LA. REV. STAT. ANN. 655 (West 1978) and WIS. STAT. ANN. 632.24 (West Supp. 1978). In some states, such as New York, the judicial equivalent of a direct action statute has been created. *See, e.g.,* Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99, (1966). The constitutionality of such statutes has come under attack since the Supreme Court's decision in Shaffer v. Heitner, 433 U.S. 186 (1977), but they have generally been upheld. *See, e.g.,* Savchuk v. Rush, \_\_\_ Minn. \_\_\_, 245 N.W.2d 624 (1976), *vacated and remanded*, 433 U.S. 902 (1977), *aff'd en banc*, 272 N.W.2d 888 (1978) (Minnesota statute upheld as constitutional); O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir. 1978) (New York common law upheld); Alford v. McGaw, 402 N.Y.S.2d 499 (App. Div. 1978) (same).

83. H.R. REP. NO. 94-1487, *supra* note 5, at 29.

This is quite important, for there may be cases involving large commercial accidents in which the obligation of the insurer is the only substantial asset available, especially where the accident involves a state with little commercial contact with the United States. An example can be easily envisioned. Suppose that a tanker belonging to Libya, en route to a Canadian refinery with a cargo of crude oil, goes aground and breaks up off the coast of Maine, causing millions of dollars in property damage and clean-up costs. If the Libyan government has no property in the United States which can be executed against, plaintiffs would have no recourse but to bring suit against Lloyd's of London, or whomever had insured the ship. There would be adequate assets, since the plaintiff could elect to enforce the judgment in any jurisdiction in which the insurer did business.<sup>84</sup> The burden of this method of enforcing a judgment might fall on the insurers, who could, at times, find themselves paying twice -- once in the United States to injured plaintiffs and once elsewhere to the insured. The insurer could always implead the foreign state in the American action, but it is not certain that a judgment there would be given *res judicata* effect in the courts of other nations if and when the foreign state brought suit upon the policy.<sup>85</sup>

E. §1610(b): *Further Exceptions for the Property of Agencies*

The drafters of the Act were more generous to American plaintiffs in §1610(b), which provides addi-

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84. The likely jurisdiction would be New York, since almost all insurance companies could be found "doing business" there. Like most states, New York requires insurers to have available substantial assets to ensure satisfaction of claims in the state. 27 N.Y. INS. L. §§411, 413, 425 (McKinney 1966).

85. Recognition of the American judgment might depend on a variety of factors, including the foreign judgment recognition policies of the American forum state and the foreign state where the insured brings suit, the public policies of the foreign forum, and the existence of any international agreement binding on both fora. See generally Homburger, *Recognition and Enforcement of Foreign Judgments*, 18 AM. J. COMP. L. 367 (1970); and von Mehren and Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1601 (1968).

tional exceptions from immunity for the property of agencies and instrumentalities of foreign states. If the agency is engaged in any sort of commercial activity in the United States,<sup>86</sup> then all of its property is subject to execution if one of two additional conditions is fulfilled: either there must have been a waiver of immunity from execution, or else the judgment sued upon must relate to a claim for which immunity from jurisdiction is denied by §§1605(a)(2), (3), (5) or 1605(b). This contrasts sharply with the provisions for execution of property under §1610(a), where immunity hinges on the nature and use of the property. The distinction is important, because it means that in most suits against an agency of a foreign state, all of the agency's property in the United States will be available to satisfy any judgment entered. Since the bulk of cases involving American businesses will arise under §§1605(a)(2), (3), (5), or 1605(b), the effect of the second condition is to make the agency's non-immunity from execution nearly coextensive with its non-immunity from jurisdiction, as far as many business plaintiffs are concerned.

The principles governing waiver by an agency or instrumentality are identical to those mentioned earlier in the discussion on waiver by states.<sup>87</sup> An action which has been or would be judged a waiver by a foreign state would also constitute a waiver if taken by an agency. In seeking execution under §1610(b)(1), it is important to keep in mind that the action constituting the implicit or explicit waiver can be taken by the agency or its parent government.<sup>88</sup>

But even with the broadened provisions for waivers, most plaintiffs will proceed under the even more liberal second exception, §1610(b)(2), which denies immunity when "the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based." A brief examination of the scope of these provisions of §1605 is necessary.

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86. The commercial activity need only have a "substantial contact" with the United States. See 28 U.S.C. §1604(e) (1976) and H.R. REP. NO. 94-1487, *supra* note 5, at 16-17. As to whether an activity is commercial in nature, see notes 44-49 *supra*, and accompanying text.

87. See note 62 *supra*, and text at pp. 124-125.

88. H.R. REP. NO. 94-1487, *supra* note 5, at 18 and 28.

§1605(a)(2). Probably the most important exception for the conduct of international business is §1605(a)(2), which denies immunity from jurisdiction in three categories of cases:

...[those in which] the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;...

The first category of actions, those "based upon a commercial activity carried on in the United States," is the broadest of the three. It would automatically subsume many actions which might otherwise be brought under the second category. In order to be carried on in the United States, the commercial activity need not be performed entirely in the United States.<sup>89</sup> Rather, the activity is required only to have a "substantial contact" here.<sup>90</sup> Congress clearly left it to the courts to determine what constitutes "substantial contact," although it did require "a degree of contact beyond that occasioned simply by U.S. citizenship or U.S. residence of the plaintiff."<sup>91</sup>

In practice, the first category may well blend in with the second with no adverse results. Courts need not draw a sharp distinction, since only one or the other must be satisfied. In cases falling into the second category, the commercial activity need not take place in the United States, although some act performed

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89. *Id.* at 17.

90. *Id.*

91. *Id.* See also *Upton v. Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978).

in connection with the activity must.<sup>92</sup> The limits of this category will be drawn by interpretations of the minimum contact required to cause an act to be performed "in connection with a commercial activity" elsewhere.

The jurisdictional necessity that an act have some nexus with the United States is satisfied in the third category by the requirement that the act, though performed abroad, have a "direct effect in the United States."<sup>93</sup> The breadth of the jurisdiction granted by this part of §1605(a)(2) will depend on the meaning given to the term "direct effect" by the courts, which

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92. Such situations would include "a representation in the United States by an agent of a foreign state that leads to an action for restitution based on unjust enrichment; an act in the United States that violates U.S. securities laws or regulations; [or] the wrongful discharge in the U.S. of an employee of a foreign state who has been employed in connection with a commercial activity carried on in some third country." H.R. REP. NO. 94-1487, *supra* note 5, at 19. Depending on the circumstances, some of these acts might also constitute commercial activities under the definition in 28 U.S.C. §1603(d) (1976), and thus also come under the first category in §1605(a)(2).

93. See H.R. REP. NO. 94-1487, *supra* note 5, at 19: "The third situation ... would embrace commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Law of the United States (1965)."

Section 18 reads:

A state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside its territory and causes an effect within its territory, if either

(a) the conduct and its effect are generally recognized as constituent elements of a crime or tort under the law of states that have reasonably developed legal systems, or

(b) (i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a direct and foreseeable result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

are grappling with the issue.<sup>94</sup> In the most important case decided to date, *Carey v. National Oil Corp.*,<sup>95</sup> the Court of Appeals for the Second Circuit adopted a view of this term which unduly narrows the scope of jurisdiction under this section. If the Second Circuit's interpretation is widely applied, only circumstances substantially analogous to the celebrated "bullet across the border" would qualify as "direct effects" giving rise to a justiciable cause of action.<sup>96</sup> Whether the jurisdiction granted in this clause of §1605 (a)(2) is thus to be restricted still remains to be seen, however.

§1605(a)(3). Section 1605(a)(3) covers claims arising out of violations of international law.<sup>97</sup> Immunity is denied when the expropriated property, or any property exchanged therefore, is owned or operated by an agency which is engaged in a commercial activity in the United States. Again, the Act makes it easier to execute against the property of an agency than against that of a foreign state. While execution against state property under §1610(a)(3) is limited to the expropriated property and any property exchanged for it which is found in the United States, in the case of execution against agency property, neither the expropriated property nor any property exchanged for it need be present in the United States.<sup>98</sup> Moreover,

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94. See, e.g., *Upton v. Empire of Iran*, 459 F. Supp. 264 (D.D.C. 1978) and *Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979).

95. In *Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979), the Second Circuit adopted a narrow view of the term "direct effect" in holding that the actions of Libyan instrumentalities in breaching a contract with a wholly-owned Bahamian subsidiary of an American corporation, and the actions of the Libyan government in inducing such a breach, had no direct effect in the United States. The court reached this conclusion even though the defendants knew that the Bahamian corporation's sole function was to refine the oil and funnel it to the American parent, and there was evidence to the effect that the defendants' actions were taken for the explicit purpose of cutting off oil supplies to the United States, thereby hoping to cause economic injury here.

96. However, actions such as that involving the Libyan oil tanker, discussed at pp. 131-132 *supra*, could conceivably still be brought.

97. See notes 69-79 *supra*, and accompanying text.

98. H.R. REP. NO. 94-1487, *supra* note 5, at 19,



since under this provision the property can be either movable or immovable, it seems especially likely to have a wider practical application than §1610(a)(3). For instance, a plaintiff whose oil refinery had been expropriated without compensation would have a recourse if the refinery were now owned or operated by an agency, whereas he would not be able to execute against the state unless it could be shown that the property seized in the United States had been exchanged for the refinery. Despite its broader scope, this section, like §1610(a)(3), will be hampered by the difficulty of proving property transfers and ownership in a foreign state.

§1605(a)(5). The wording of §1605(a)(5) is deliberately general, in order to cover cases:

...not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.<sup>99</sup>

The primary objective of this subsection, as with §1610(a)(5), is to provide a remedy for victims of automobile accidents, although it applies to a variety of other non-commercial torts as well.<sup>100</sup> The deliberate exclusion of claims based upon discretionary acts and claims arising from interference with contract rights means that it will have little signifi-

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99. *Id.* at 20-21.

100. *Id.*

cance for the conduct of international business,<sup>101</sup>

§1605(b), The law in the area of maritime liens is substantially revised by §1605(b), which denies immunity from execution when the lien "is based upon a commercial activity of a foreign state."<sup>102</sup> Under the Act, the nature of the claim is changed, so that it is no longer brought in rem against the ship, but rather in personam against the sovereign owner.<sup>103</sup> In addition, a special procedure for service of process is prescribed, by which the plaintiff may gain in personam jurisdiction over the state.<sup>104</sup> The intent of the drafters that in rem jurisdiction be done away with is underscored by the harsh penalty --dismissal of the cause of action-- provided for all plaintiffs who attempt to use in rem methods to arrest ships which they know, or should know, belong to a foreign state.<sup>105</sup> And while recovery under §1605(b) is limited to the value of the ship and its cargo, this poses no great hardship for plaintiffs. Section 1605(b) does not preclude the bringing of another action under this or some other section of the Act, to recover the difference between the amount realized and the amount due.<sup>106</sup>

Under the jurisdictional provisions referred to in §1610(b)(2), the justiciability of a claim depends upon the nature of the underlying transaction or act, whether it be a contract or a nationalization. Section 1610(b)(2), by removing immunity from execution in cases arising under these provisions, makes the immunity from execution dependent upon the nature of the act underlying the claim. It makes little difference whether this development is explained by a theory of waiver (*i.e.*, that by undertaking certain activities an agency waives its immunity from jurisdiction and execution),

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101. *Cf.* *Carey v. National Oil Corp.*, 453 F. Supp. 1097 (S.D.N.Y. 1978) (allegation of tortious interference with contract rights under concession agreement does not state a justiciable claim under the Act).

102. See H.R. REP. NO. 94-1487, *supra* note 5, at 21-22.

103. For a thorough discussion of the nature of the maritime lien, see G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY*, 586 *et seq.* (1957).

104. 28 U.S.C. §1605(b)(1) & (2) (1976).

105. This provision was invoked in *Jet Line Services, Inc. v. M/V Marsa El Hariga*, Civ. No. Y-78-80 (D. Md. 1978), to terminate the action of a plaintiff who refused to release an attached ship belonging to a foreign state.

106. H.R. REP. NO. 94-1487, *supra* note 5, at 22.

or by asserting that no immunity attaches to certain activities. In either case, §1610(b)(2) is a radical departure from prior practice and affords an agency a much more restricted immunity than is given to the state itself.

F. §1610(d): *Narrowed Use of Attachment*

Prior to the enactment of the Foreign Sovereign Immunities Act, both the State Department and the courts had allowed the use of attachment against a foreign state, but only for purposes of gaining quasi in rem jurisdiction.<sup>107</sup> The Act prohibits this practice, but more than makes up for the deprivation with the liberal personal service provisions of §1608.<sup>108</sup> Moreover, §1610(d) of the Act does provide for attachment if the foreign state has explicitly waived its immunity from attachment prior to judgment, and if "the purpose of the attachment is to secure satisfaction of a judgment that has been or ultimately may be entered against the foreign state...."<sup>109</sup> Again, the Act is deliberately vague; the need for continuous judicial supervision, both at the commencement and during the duration of the attachment, is obvious.

It remains to be seen whether plaintiffs can make effective use of this provision, but it is certain that potential plaintiffs would do well to ensure that contracts governing their transactions with foreign states contain an explicit waiver of immunity from pre-judgment attachment, whenever possible. This provision of the Act appears to be quite narrowly drawn, although it could have an important effect in cases where an explicit waiver has been made by the state. Quick use of this attachment provision once an action is begun might prevent the transfer of property from commercial to non-commercial use, greatly strengthening the plaintiff's hand in subsequent court proceed-

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<sup>107</sup> However, this practice was not permitted until 1959. See note 10 *supra*.

<sup>108</sup> See note 7 *supra*, and 28 U.S.G. §1608 (1976).

<sup>109</sup> H.R. REP. NO. 94-1487, *supra* note 5, at 30.

ings or negotiations.<sup>110</sup>

G. §1610(c): *Necessity for a Court Order*

In the past, various methods, ranging from court orders to simple application to a local sheriff, have sufficed to attach or execute against the property of foreign states.<sup>111</sup> Congress felt that some of these methods failed to afford states adequate protection of their rights, and were likely to have adverse consequences on American foreign relations.<sup>112</sup> Therefore, a prohibition was inserted in §1610(c), forbidding execution or attachment without a court order.<sup>113</sup> The court order, in turn, must be preceded by a finding by

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110. Such a transfer would render the property immune from execution. See notes 34-36 *supra* and accompanying text. A good example of the pressure which a plaintiff could bring to bear is found in the recent litigation involving Ipitrade International, S.A. and the Nigerian government. A Swiss arbitrator had awarded Ipitrade \$9,066,138.75 in a compulsory arbitration arising out of the breach of a cement contract between the two parties. When Nigeria refused to pay the award, Ipitrade sought successfully to have the arbitration registered in the United States (Ipitrade Int'l, S.A. v. Nigeria, 465 F. Supp. 824 (D.D.C. 1978)), and sought attachment of certain property in France. In the French action, Ipitrade was able to attach funds held for or owed to Nigeria by French banks and industrial concerns. Nigeria then agreed to settle the claim for about \$6,000,000, and the French attachment was lifted. Ipitrade Int'l S.A. v. Banque Nationale de Paris, Judgment of Sept. 12, 1978, Trib. gr. inst., Paris.

111. Cf. Weillamann v. Chase Manhattan Bank, 21 Misc.2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959) (attachment by application to sheriff); Chemical Natural Resources, Inc. v. Republic of Venezuela, 420 Pa. 134, 215 A.2d 864 (S. Ct. 1966) (same).

112. H.R. REP. NO. 94-1487, *supra* note 5, at 30.

113. 28 U.S.C. §1610(c) (1976):

No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter,

the court that "a reasonable period of time" has elapsed since the entry of judgment and the giving of any notice required. A good deal of discretion was given to courts in deciding when a reasonable time has elapsed, thus allowing them to exercise flexibility according to the circumstances of the case.<sup>114</sup> In making such decisions, courts are to "take into account procedures, including legislation, that may be necessary for payment of a judgment by a foreign state, which may take several months; representations by the foreign state of steps being taken to satisfy the judgment;...or evidence that the foreign state is about to remove assets from the jurisdiction to frustrate satisfaction of the judgment."<sup>115</sup> Plaintiffs attempting to secure such an order should be on the lookout for supporting evidence, such as prior instances of evasion of judgments by the defendant state, or statements by agents of the state which would indicate an intent to evade satisfaction of the judgment.

Execution and attachment of the assets of a foreign state are not automatic. It is up to the plaintiff to convince the court that one or the other is warranted in a given case. But, in considering whether or not to grant motions for execution or attachment, courts should be careful not to err too much in favor of the defendant state, for to do so may well deprive a plaintiff of his sole means of satisfying a judgment against an intransigent sovereign.

### *Conclusion*

The execution and attachment provisions of the Foreign Sovereign Immunities Act represent drastic departures from the prior law in those areas. But, as this discussion has served to show, the Act also leaves numerous unanswered questions. Knowing this fact, Congress deliberately left to the courts a good deal of flexibility in applying the standards set out in the Act.

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114. H.R. REP. NO. 94-1487, *supra* note 5, at 30.

115. *Id.*

It will be up to the courts to interpret the Act and to give definition to its presently vague standards. The manner in which they accomplish this task will determine whether the Act heralds a new era of security for those engaged in commercial dealings with foreign states, or whether they will still have to rely on the goodwill of the foreign state. The execution and attachment provisions can serve the important function of providing sanctions for the Act's jurisdictional provisions, but only if the general intent of the Act governs the process of adjudication.



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